

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

FRED ROHRBACKER,

Plaintiff,

v.

MODERN CONTINENTAL COMPANIES, INC.,)
HARBOR CRUISES, LLC, BOSTON HARBOR)
CRUISES, A JOINT VENTURE,)
PROVINCETOWN PUBLIC PIER CORP., and)
PROVINCETOWN-MACMILLAN REALTY)
TRUST,)

Defendants.

Civil Action No. 05-11562-RGS

**STATEMENT OF UNDISPUTED FACTS
IN SUPPORT OF DEFENDANT PROVINCETOWN-
MACMILLAN REALTY TRUST'S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Local Rule 56.1, Defendant Provincetown-MacMillan Realty Trust (the "Trust") hereby files this Statement of Undisputed Facts in support of its Motion for Summary Judgment.

UNDISPUTED FACTS

1. The Trust is the owner of the property located at 16 MacMillan Pier described in the Barnstable Registry of Deeds at Book 12986, Page 339 through Book 12987, Page 3 (the "Property"). A copy of the instrument conveying title to the Trust is attached as Exhibit A; *see also* excerpts of Frederick L. Nolan Deposition at p. 10:13-22, attached as Exhibit B.

2. Under an instrument entitled "Standard Form Commercial Lease," the Trust leased a portion of the Property to Codefendant, Harbor Cruises, LLC (the "Lease"). *See* Standard Form Commercial Lease dated May 2, 2000 attached hereto at Exhibit C. Harbor

Cruises used the portion of the Property covered by the Lease as part of its business of offering ferry rides from Boston to Provincetown, Massachusetts. *See* Exhibit B, at p. 7:9-11.

3. Under the Lease, the portion of the Property leased to Harbor Cruises was described as “[t]he docks, piers, floats and marine equipment located on and around the premises known and numbered as 16 MacMillan Wharf, Provincetown, Massachusetts as shown on a plan attached hereto as Exhibit A.” Exhibit C.

4. The parties to the Lease did not attach an Exhibit A. Exhibit B, pp. 21-22. However, the Leased Premises included the area at the top of the gangway which extends past the Harbor Cruises ticket window to the Provincetown Public Pier. Exhibit B, pp. 72-74; Affidavit of Frederick Nolan III, attached as Exhibit F.

5. On September 13, 2003, Plaintiff Fred Rohrbacker (“Rohrbacker”) was a passenger on the Harbor Cruises’ 6:30 p.m. ferry from Boston to Provincetown. *See* First Amended Complaint ¶ 8; Trust’s Answer to First Amended Complaint ¶ 8; Rohrbacker’s Answers to Interrogatories Nos. 2, 3 attached as Exhibit D.

6. After it docked, Rohrbacker fell while exiting the ferry at or about 8:10 p.m. Exhibit D, Interrogatory Answer No. 2, 3.

7. According to Rohrbacker, he fell in an area at the top of the gangway, between two red supporting columns nearest to the gangway to the ferry. Exhibit D, Interrogatory Answer No. 3; see excerpts of Rohrbacker’s Deposition at p. 52-53, pp. 131-132, attached hereto as Exhibit E.

8. The area in which Rohrbacker fell is part of the Leased Premises. *See* Exhibit B, p. 72-74; Exhibit F, ¶¶3-4.

9. According to Rohrbacker, the unsafe and dangerous conditions which were the

cause of his fall were 1) poor lighting conditions in the area where he fell; and 2) the existence of a wooden structure on the floor of the pier which was adequately marked. Exhibit D, Interrogatory Ans. No. 5; Exhibit E, pp. 137-146.

10. The Trust has never undertaken any repairs of, or exercised any control over, the area in which Rohrbacker allegedly fell after the effective date of the lease. Exhibit F, ¶ 6, attached as Exhibit F.

11. Under the Lease, it was Harbor Cruises' responsibility to maintain the area of the Leased Premises, including the provision and maintenance of lighting in the area. Exhibit F, ¶ 5.

**PROVINCETOWN-MACMILLAN
REALTY TRUST**

By its attorney,

/s/ Kevin T. Smith
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Dated: November 15, 2006

CERTIFICATE OF SERVICE

I, Kevin T. Smith, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on November 15, 2006.

/s/ Kevin T. Smith

Kevin T. Smith

Dated: November 15, 2006